No. 92-1839

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

COLGATE-PALMOLIVE COMPANY,

Petitioner,

v.

FRANCHISE TAX BOARD,
An Agency of the State of California,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of California In And For The Third Appellate District

BRIEF OF RESPONDENT FRANCHISE TAX BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether congressional consent to state action, which precludes judicial scrutiny of such action under the dormant Commerce Clause, may be found by implication from congressional actions.

2. If a dormant Commerce Clause analysis were appropriate, whether worldwide combined reporting as applied to a U.S.-based multinational group frustrates federal foreign policy, in violation of the foreign Commerce Clause.

3. Whether a purely prospective application should be made of any decision on the merits which concludes, contrary to this Court's existing precedent, that California's worldwide combined reporting tax method is unconstitutional as applied to a domestic-based business.

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STATUTORY AND CONSTITUTIONAL PROVISIONS

Article II, section 2, clause 2 of the United States Constitution (in part):

> "[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. . . . "

SUPPLEMENTAL STATEMENT OF THE CASE

Pursuant to Rule 15.1, the Franchise Tax Board supplements Colgate-Palmolive Company's statement of the case to point out omissions and inaccuracies. Initially, it must be noted that this case does not raise any "issues of profound national and international significance regarding the states' power to require multinational corporations to report their income on a worldwide combined basis." (Petition, pp. 2-3.) Those issues, to the extent they are raised, and to the extent they may be of "profound . . . significance" are raised in the *Barclays* case (*Barclays Bank Int'l.* v. *Franchise Tax Bd.*, 2 Cal.4th 708, 8 Cal.Rptr. 2d 31, 829 P.2d 279 (1992) *on remand*, 11 Cal.App.4th 1678a (3d Dist. 1992) *petition for cert. filed sub nom. Barclays Bank PLC* v. *Franchise Tax Board*, 61 U.S.L.W. 3621 (Feb. 22, 1993) (No. 92-1384)). The issues Colgate attempts to raise in this case have already been conclusively decided in the decisions of this Court in *Container Corporation of America* v. *Franchise Tax Board*, 463 U.S. 159 (1983) (hereafter *Container*); *Wardair Canada* v. *Florida Department of Revenue*, 478 U.S. 1 (1986) (hereafter *Wardair*) and *Itel Containers International Corp.* v. *Huddleston*, ___U.S. ___, 113 S.Ct. 1095 (1993) (hereafter *Itel*).

At Petition, page 5, Colgate states that California's worldwide combined reporting method of taxation has been opposed by various taxpayers and foreign governments "because of its disregard of the established international norm of tax accounting." Colgate fails to note that such opposition is also based on the greater tax liability that may be incurred under the California system (see e.g., Statement of the United Kingdom before the United States Treasury Working Group on Worldwide Unitary Taxation, Stip. ¶ 38a) and that the purported international norm "is subject to manipulation and imprecision, and often ignores or captures inadequately the many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise." (*Container* at 164-165.)

Colgate states "it has been the expressed policy of the federal government to oppose the states' use of the worldwide combined reporting method of taxing multinational corporations because of that method's impact upon relations with foreign nations." (Petition, p. 6.) Colgate fails to mention that the cited expressions of opposition (statements and letters) were not made in the context of this domestic-parent case,[1] and do not constitute formal statements of policy from the federal government as a whole, but emanate only from certain members of the Executive Branch. Nor does Colgate mention the many instances wherein Congress considered the issue of the worldwide combined reporting method, but declined to proscribe its use. (See Petition, Appendix B, p. 16a.) Most significantly, Colgate omits any mention of the fact that the U.S. Senate refused to ratify the United States-United Kingdom Tax Treaty until the provision which would have prohibited use of the worldwide combined reporting method was deleted. (See Petition, Appendix B, p. 16a; Appendix E, p. 45(a).)

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[1] The Brady letter, although referring to this domestic parent case (Petition, p. 6, fn. 11) addresses the issues as a matter of *tax policy* rather than foreign policy.

SUMMARY OF THE ARGUMENT

Colgate, in its petition for certiorari, attempts to ride the coattails of the petitioner in *Barclays Bank (Barclays Bank PLC* v. *Franchise Tax Board,* Docket No. 92-1384). It does so because in the present case brought by Colgate itself, all relief is barred by this Court's decision in *Container.* Regardless of whether this Court decides to hear the *Barclays* case there is absolutely no reason for it to revisit the issues it decided only ten years ago in *Container.* In analytical terms, *Colgate is Container;* Colgate's case has been decided, and its suit for refund must fail.

Colgate argues that the decision below misreads and misapplies this Court's decision in *Wardair* in holding that Congress has authoritatively permitted the tax at issue here and that therefore no dormant Commerce Clause analysis is necessary. Assuming arguendo that Colgate were correct and that dormant Commerce Clause analysis were appropriate, Colgate still cannot prevail because in *Container,* this Court has already undertaken dormant Commerce Clause analysis of the application of the worldwide combined reporting as applied to a domestic-based multinational and has found the tax to be constitutional.

Quite significantly, this Court very recently has answered Colgate's question No. 1 (Petition i) affirmatively in *Itel,* at 113 S.Ct. 1105, wherein the inference of congressional intent to permit the tax at issue in that case is drawn from the congressional failure to proscribe it. As noted by Justice Blackmun in his lone dissent, the *Itel* majority finds "authorization for the tax in congressional silence." (*Id.,* 113 S.Ct. 1110.)

Colgate argues that the federal government has now supplied a statement of its position – the "missing evidence" that was absent in *Container.* The "evidence" Colgate relies upon for this assertion – a presidential press announcement; a letter from Secretary of State Schultz to Governor Deukmejian; and a personal letter from Secretary of Treasury Brady to the CEO of Colgate, Reuben Marks – cannot reasonably be considered to be an embodiment of the federal "*law* as it presently stands." (See *Wardair* at 477 U.S. 10; emphasis in original.) Nor is there any reason to infer from this Court's decision in *Container* that the decision would have been different if there had been such "evidence" of the views of the Executive Branch at the time of that decision.[2]

Colgate's argument for equal treatment is predicated upon the dual assumptions that this Court will grant the *Barclays* petition and will overturn worldwide combined reporting as applied to a foreign-based business. Neither event has occurred, nor is there any likelihood that they will occur. This issue is not ripe for this Court's review.

In sum, Colgate's question concerning congressional silence has been answered by *Itel.* However, even if Colgate were to prevail in its argument that dormant Commerce Clause analysis is called for in this case, it loses.

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[2] In *Container* this Court stated at 463 U.S. 195-196 that the failure of the Executive Branch to file an amicus brief was "by no means dispositive." See also *Wardair,* wherein this Court had before it an Executive Branch amicus brief in opposition to the tax (*id.,* 477 U.S. at 9, 11) but relied entirely on the implications of *congressional* action in reaching its decision.

This Court engaged in dormant Commerce Clause analysis in *Container* and found the tax to be constitutional. Colgate presents no new evidence of any probative value to this issue. There is absolutely no reason for this Court to accept this case for review.

Finally, in the unlikely event that review were granted and this Court reached a determination on the merits, contrary to *Container,* that the tax at issue is unconstitutional, respondent submits that any such decision should have purely prospective application.

ARGUMENT

I.

THIS COURT'S DECISION IN *WARDAIR* MAKES DORMANT COMMERCE CLAUSE ANALYSIS UNNECESSARY. HOWEVER, EVEN IF THAT ANALYSIS WERE TO BE UNDERTAKEN, COLGATE'S CASE HAS BEEN DECIDED BY THIS COURT IN *CONTAINER*.

Colgate petitions from the decision of the California Court of Appeal which, in turn, relies on the California Supreme Court's holding in *Barclays* that Congress has authoritatively consented to the use of worldwide combined reporting and that therefore dormant Commerce Clause analysis is not necessary to a finding of its constitutionality. Colgate argues that such congressional consent cannot be inferred from the evidence presented in

the *Barclays* case (which incidentally is the same evidence presented in this case).[3]

The California Supreme Court's decision in *Barclays* rested on the authority of this Court's holding in *Wardair* that no dormant Commerce Clause analysis need be undertaken when Congress has authoritatively assented to the tax in question, and that such assent may be understood from the implication of congressional actions. Colgate, however, argues that the California Supreme Court misapplied *Wardair,* and that its petition should be granted in order that this Court can address this misapprehension. *Colgate* is not a case in which this issue should be decided. Even if congressional assent to the tax method in question could not be inferred from the evidence, the resulting application of a dormant Commerce Clause analysis would defeat Colgate's claims, because this Court has already undertaken that exercise in *Container,* and has already sustained the constitutionality of the tax method with respect to a U.S.-based multinational business.

Colgate's argument that the California Court of Appeal's *Colgate* decision misapplies *Wardair* relies on the fact that this Court engaged in dormant Commerce Clause analysis in *Container* with virtually the same evidence of Congressional action or inaction before it. However, Colgate neglects to recognize two key factors: (1) this Court's *Container* decision, which considered the evidence in determining that California's practice did not "violate[] a clear federal directive" (463 U.S. at 194,

[3] See Petition, Appendix B, p. 16a.

196-97), did not consider whether the evidence indicated that Congress had *permitted* the use of worldwide combined reporting; (2) in *Container*, California's application of a dormant Commerce Clause analysis to a domestic parent multinational business resulted in a holding that worldwide combined reporting is constitutional. This Court should not accept a case in which the outcome is a foregone conclusion regardless of the method of analysis.

II.

COLGATE DOES NOT AND CANNOT RAISE THE SAME ISSUES AS *BARCLAYS*, AND ITS EQUAL TREATMENT ARGUMENT IS PREMATURE

At page 11 of its petition, Colgate asserts that "The issues raised by the Petition in *Barclays* – issues concerning the constitutionality of worldwide combined reporting under the Commerce Clause and the criteria for determining whether Congress has consented to state action under the Commerce Clause – are the issues that lie at the heart of Colgate's petition. . . . Both the petition in *Barclays* and this petition raise *exactly* the same issue regarding whether Congress has consented to California's use of worldwide combined reporting." A more correct statement would be that both petitions raise the issue of whether under this Court's most recent Commerce Clause jurisprudence, dormant Commerce Clause analysis is necessary. However, as to the dormant Commerce Clause, the issue raised in *Barclays* is the issue reserved in *Container*, the constitutionality of the application of worldwide combined reporting to a *foreign*-based business. In *Container*, this Court has addressed the dormant

Commerce Clause issues which could arise in Colgate's case, in *exactly* the context in which they are raised by the petitioner, a domestic-based business. Colgate has given no convincing reason why *Container* should be reconsidered.

Colgate's argument that U.S. parent groups must be treated the same as foreign parent groups is premature. It is a well-settled principle that this Court will not consider constitutional issues that are not ripe for determination. (*Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974).) Colgate cites no current final decision or other circumstance which leads to unequal treatment of the two groups. The decision of the California Court of Appeal which is the subject of this petition for *certiorari* is based upon and consistent with this Court's holding in *Container* and with the California Supreme Court's decision in the *Barclays* case. Under these circumstances worldwide combined reporting is applied equally to both domestic and foreign-based unitary businesses. There is equal treatment and no basis for consideration of this issue.

The California Court of Appeal in its first opinion (it had no reason to reach this issue in its second opinion) summarized and addressed Colgate's contentions on equal treatment as follows:

> " . . . on constitutional grounds involving equal protection and the Commerce Clause, Colgate also argues that foreign-parent groups and their domestic-parent counterparts must be treated identically for tax purposes. We are not aware of any final decision holding that state application

of the worldwide unitary tax method to foreign parent groups is unconstitutional under the foreign Commerce Clause. Until such decision, this issue of equality is premature. There is a well-settled principle that courts do not consider constitutional issues that are not ripe for determination. We adhere to that principle in this case and do not express any views on this issue. *We do note that this issue was not litigated below in any meaningful fashion, was not part of the trial court's decision, and consequently has not been briefed adequately here.*" (Petition, Appendix E, p. 66a, fn. 12, emphasis added.)

What Colgate requests is that this Court should conclude in *this* case (involving a domestic parent) that the application of the worldwide unitary method to *foreign*-based groups violates the Commerce Clause and, if this is so, that "application of the tax scheme to domestic-based multinational groups such as Colgate cannot withstand constitutional scrutiny." This case, however, is manifestly not the case in which the constitutionality of worldwide combined reporting as applied to a *foreign*-based parent should be decided. The analysis of the Court of Appeal was correct. Colgate's argument is unpersuasive. Unless or until there is a final decision or some other circumstance by which foreign-based multinational corporations are exempted from the operation of the tax, no discrimination exists with respect to domestic corporations. Colgate's equal treatment issue is not properly before this Court now any more than it was before this Court in *Container*.

III.

THIS COURT'S DECISION IN *CONTAINER* IS CONTROLLING. COLGATE PRESENTS NO NEW ISSUE OR SIGNIFICANT CHANGE OF CIRCUMSTANCE.

Colgate asserts that *Container* may be distinguished or ignored because this Court at the time of the *Container* decision in 1983 did not have before it a clear statement of federal policy from the Executive Branch. Colgate mistakenly attributes to *Container* the proposition that the result in that case would have been different as a matter of law had there been a clear statement from the Executive Branch of a federal policy against the use of the worldwide unitary method involving domestic parent corporations.

In *Container* this Court took note that the Solicitor General did not submit an amicus curiae brief in *Container*, and that the *amicus curiae* brief of the Solicitor General in *Chicago Bridge & Iron Co.* v. *Caterpillar Tractor Co., appeal dismissed*, 464 U.S. 1013 (1983), did not necessarily apply to the *Container* case. (463 U.S. 195-196, fn.33.) However, nothing in *Container* suggests it would have been decided differently had the Solicitor General filed an *amicus curiae* brief. On the contrary, this Court stated in no uncertain terms that " 'The lack of such a submission *is by no means dispositive.*' " (*Container, supra*, 463 U.S. at 195-196, emphasis added.) Moreover, this Court surely never intended to resolve the "one voice" Commerce Clause issue by looking solely to the position of the Executive Branch. Instead, this Court declared that the nuances of the foreign policy of the United States are much more the province of the Executive Branch and Congress than that of the Court. (*Container*, 463 U.S. at

196.) In *Wardair*, this Court entirely dismissed the arguments of the *amicus* brief of the Executive Branch and looked solely to the manifestations of congressional intent in deciding the Commerce Clause issue. (*Id.*, 477 U.S. at 9.) A similar approach was taken in *Itel*, wherein this Court relied on the congressional manifestation of intent to permit the tax, and noted with respect to the U.S. *amicus* brief filed in that case only that the Court found "no reason to disagree with the United States' submission."[4] (*Id.*, 113 S.Ct. at 1105.)

Colgate states that the "missing evidence which was crucial in *Container* has now been supplied by the federal government." (Petition, p. 22.) However, the California Court of Appeal reviewed this "evidence" and found that it did *not* constitute a clear federal directive for purposes of this domestic parent case. As the California Court of Appeal noted in its first opinion (Petition, Appendix E), the Executive Branch was twice explicitly notified about this case, and this case could not have provided a more appropriate context for the executive branch to express its views regarding the application of the unitary method to domestic-parent groups with foreign subsidiaries. "Nevertheless the executive branch here, as in *Container*, has chosen to remain silent." (Petition, Appendix E, p. 56a; see also discussion, pp. 49a-63a.)

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[4] See also the dissent of Justice Blackmun wherein he states that "consistent with the separation of powers [the *amicus* brief] may not be given any weight beyond the power to persuade," and further notes: "The power to regulate foreign commerce is textually delegated to Congress alone" citing article I, section 8, clause 3 of the United States Constitution. (*Id.*, at 113 S.Ct. 1110.)

IV.

IF COLGATE'S PETITION WERE GRANTED AND COLGATE WERE TO PREVAIL, RELIEF SHOULD BE GRANTED PROSPECTIVELY ONLY.

On June 18, 1993, this Court announced in *Harper* v. *Virginia Dept. of Taxation*, 91-794, ___ U.S. ___, 61 U.S.L.W. 4664, 4666-4667 (1993), "when this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." In *Harper*, this Court relied on the majority consensus in *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. ___, 111 S.Ct. 2439 (1991), in holding that "when this Court does not 'reserve the question whether its holding should be applied to the parties before it' . . . its rule should apply retroactively to the litigants then before the Court." (61 U.S.L.W. at 4667.)

Should this Court grant Colgate's petition, and should Colgate prevail on the constitutional issues, the newly announced rule should not be applied to Colgate's claims in this case but should apply prospectively only. Colgate differs in no pertinent respect from the taxpayer in *Container*. In *Container*, the identical law challenged by the petitioner as applied to an identically situated domestic-based multinational business was declared constitutional in the face of identical Commerce Clause arguments. Overruling of that decision in the circumstances of this case would clearly constitute a new and unanticipated principle of law with severe fiscal impact on the State of California if applied retroactively.

In such an event, this Court should apply its own test, announced in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 at 106-107 (1971), as follows:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e.g., Hanover Shoe v. United Shoe Machinery Corp.*, [392 U.S. 481], at 496 [(1968)], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g., Allen v. State Board of Elections*, [393 U.S. 544], at 572 [(1969)]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter v. Walker*, [381 U.S. 618], at 629 [(1965)]. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' *Cipriano v. City of Houma* [395 U.S. 701], at 706 [(1969)]."

Under *Chevron Oil Co.* v. *Huson*, if this case were to be decided on its merits to conclude, contrary to *Container*, that the tax is unconstitutional, then this Court should either reserve the issue of relief to the petitioner or hold that any new rule would have application prospectively

only.[5] Otherwise, under *Harper*, the rule will apply retroactively to all domestic multinationals which have done business in the State of California and which have met procedural requirements for tax relief. This could result in a revenue loss on the order of $3 billion dollars, solely on the basis of Executive Branch statements of aspiration which (1) under existing nondormant Commerce Clause precedents cannot assume the "one voice" function which the Constitution assigns to actions of Congress and (2) did not even exist at the time of the tax years in question. Respondent contends that in view of *Container's* clear past precedent on the issue, the resulting hardship to the State of California, and the equities of the situation, any decision for Colgate in this case must be applied on a purely prospective basis.[6]

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[5] As noted by Justice O'Connor in her dissent at 61 U.S.L.W., pp. 4671-4672, the *Harper* holding does not preclude purely prospective applications by this Court.

[6] In 1986, California passed legislation permitting corporations to elect, beginning in 1988, to calculate their income attributable to their California activities on a domestic, or water's edge, basis. (See Petition, Appendix B, p. 5a, fn. 4.) As a result the impact of the tax has been largely abated, and the lasting significance of any issues raised has greatly been reduced.

CONCLUSION

The questions presented in Colgate's petition have already been answered by this Court in its decisions in *Container, Wardair,* and *Itel.* Colgate cannot ride into this Court on the coattails of the *Barclays* petitioner. The petition for a writ of certiorari should be denied.

Dated: July 16, 1993.

Respectfully submitted,

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